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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-5199

KENNETH WEDRA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Question Presented

Was the defendant-petitioner denied his right to confront his accusers?

Facts

John DeTore was married to the victim Dorothy DeTore and at the same time was having an affair with another woman who he promised to marry on December 14, 1968, and while he assured his "finance" that he would get a divorce from his wife, he never asked her for one.

At the same time, unknown to either, he was a regular customer of a house of ill-repute in Bronx County operated

by one Diana Adair. Among the varied services provided at that establishment was a card game operated by one Vito DiTomasso.

Frustrated by his facade of normalcy, DeTore asked DiTomasso if he could put him in touch with a strong arm man, and indicated that the purpose was to have his wife killed. In response to his request, DiTomasso introduced DeTore to one Nicholas Gasperino, who made arrangements to have his wife killed for the sum of Nine Thousand Dollars ($9,000.00), five thousand dollars ($5,000.00) payable in advance and four thousand dollars ($4,000.00) after the job was completed. Gasperino in turn arranged for the actual trigger man, Kenneth Wedra, who was unknown to DeTore.

In furtherance of his nefarious plan, DeTore gave a key to his house and a photograph of his wife to Gasperino for use by the assassin. In the meantime, a few days before the killing, two men, in Wedra's automobile, parked for an extensive period of time in front of the DeTore house presumably to study Mrs. DeTore's pattern (1059-1064).*

On November 25, 1968, as contemplated and planned by John DeTore, Dorothy DeTore was shot to death. While there were attempts to make the act look as if it had been accomplished both in the perpetration of a sex act and during the commission of a burglary, and while the first person to enter the bedroom where her body was found, Ronald Mathers, believed such to be true, it readily became apparent that such appearances were merely a subterfuge.

Immediately after the discovery of the body, DeTore was notified and shortly thereafter, he arrived. The police soon found that witnesses in the area on the day in question

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* ( ) Indicates pages of printed record; (A) indicates pages of Respondent's appendix.

saw two men on the street entering upon the DeTore property. They however could not identify those men except for one witness, a young girl by the name of Barbara Watson who could testify that Wedra looked similar to one of the two men whom she saw.

On November 29, DeTore was interviewed at the funeral parlor by State Police Investigator Eugene Curico who advised him of his rights, and asked if he had any information that might concern persons who had a reason to kill his wife. In response, DeTore answered that he could offer no information and when asked about Shirley Hildreth (his girl friend) denied knowing her; but, when advised by the officer, that her name had been developed in the investigation, admitted knowing her and admitted that he had gone out with her but denied he had ever promised to marry her. He then changed his story somewhat to admit that he did promise to marry her but only for the purpose of keeping up sexual relationship with her.

DeTore was next interviewed at Police Headquarters in the Village of Dobbs Ferry (where the offense was committed) on Sunday, December 1st. DeTore travelled to Police Headquarters in his own car and the discussion took place in the Village Clerk's office. The officers were Detective Robert Cummingham of the Dobbs Ferry Police and State Police Investigator Matte (613-614). DeTore was advised of his rights and questioned about large withdrawals from bank accounts. He admitted withdrawing $10,000.00 from various banks and said that $5,000.00 was for a mink coat for his wife for Christmas; $2,500.00 for funeral expenses and $2,500.00 which he gave to five churches (630-635). He also stated that he had $4,000.00 in cash at his home. The police went with him with his consent to his home and obtained from him the $4,000.00 in cash (635-637). Later that evening DeTore attempted to commit suicide (640-644, 496).

The next interview with DeTore, who was not in custody this entire period, occurred on December 3rd in the office

of the Dobbs Ferry Police Chief. Det. Cunningham and Investigator Matte were again present. Cunningham advised DeTore of his rights (645-648). DeTore changed his story several times. First he said that the $2,500.00 allegedly given to the churches had in fact been taken from him by a prostitute and that he was being blackmailed by someone who demanded money in order to prevent his wife from being told about the other woman.

Finally, DeTore said that he would write out on paper what actually happened. (The statement he gave is reproduced in the record at pages 498-500). In it he did not admit specifically hiring a killer to kill his wife but simply that he retained a man called "Nick" to "solve all my problems for $9,000.00." In oral questioning, after he had written out the statement while alone in the office, he gave somewhat greater details (652-653) telling of his girlfriend who was "on his back" about his divorce, and how a fellow named "Vito" at Diana's house on Prospect Avenue introduced him to a fellow called "Nick". He also stated that he was going to pay Nick $9,000.00 to use a little muscle on Shirley. He then admitted that the $9,000.00 was not simply to scare Shirley but to kill his wife and agreed to take a lie detector test the next day (653). He offered to take the officers to the house of ill repute in the Bronx, and they proceeded there on the evening of December 3rd (653-654). While sitting in a car, he identified for them, as they walked on the street, Vito and Diana (655). DeTore was still not in custody but had asked to stay with the officers for his own protection because he feared that the killers were still looking for him, for the remaining $4,000.00 (654). He therefore spent the night in a Motel room with Detective Cunningham and Investigator Matte (658). In the morning, at Police Headquarters, he was again advised of his rights by Detective Cunningham and stated that he wished to cooperate to "get these bastards that killed his wife" (660). While being prepared for the lie detector test (which he was voluntarily to take) DeTore

gave the polygraph operator additional information. The preparation for the test was stopped for him to give to Cunningham and Matte a full stenographic statement (reproduced in the record at pages 501-506) in which he admitted his arrangements with Gasperino, the providing of a key to his house and the explicit arrangements that his wife would be killed.

After giving the statement DeTore suggested that, as he still owed $4,000.00, he could contact either Vito or Nick and get them into Westchester County so the police could apprehend them. He stated that he had Vito's telephone number plus the number of the house of ill repute. The Police advised DeTore that that could be dangerous and that if a meeting was set up they did not know what might happen. DeTore stated that he did not care as long as Matte and Cunningham stayed with him; he just didn't want to get the police hurt; he did not care about himself; he wanted to get the guys who killed his wife (678-679).

Accordingly, two rooms were rented at the Elmsford Motel and DeTore placed in one, with the police to occupy the adjoining room. DeTore consented to the recording of conversations on his Motel telephone and then proceeded to telephone Vito DiTomasso to come up to the Motel to get the pay-off. When DiTomasso arrived, and took the pay-off, he was arrested, and then gave the police Gasperino's telephone number. A telephone conversation was then completed by DeTore to Gasperino which conversation was corroborative of DeTore's statements with respect to the arrangements that he made with Gasperino. Thereafter, Wedra, who, although not in custody, was given his full Miranda warnings, when interrogated by the police, replied that he understood his rights and that he had been "through that all before". He then admitted that he was a bookmaker and that the automobile which was registered to his sister (and the license number of which corresponded to the license number of the car used

to case the DeTore house and vicinity a few days before the killing) was in fact his automobile.

Wedra was indicted, in part upon the testimony of Nicholas Gasperino, who, in the Grand Jury, identified him as the trigger man that he retained to do the DeTore job. Gasperino was promised that if he cooperated fully he would not be prosecuted but that the actual immunity that he obtained was testimonial. The People expected to use him upon the trial; however, at the trial after the People's opening had been made, Gasperino refused to testify, out of the presence of the jury.

Wedra, while in jail, admitted his complicity in the crime to an old friend, Bruno LaSpina. During trial and before Gasperino was to testify, and before the People knew that he would recant, LaSpina approached the Assistant District Attorney who was trying the case and told him about the admissions made by Wedra.

Shortly before his testimony, LaSpina received threats and succumbed to them and to the presence of faces in the court room which he recognized. Upon direct examination, he denied knowledge of the Wedra admissions to him. However, after private consultations with his attorney he returned to the court room and testified truthfully. Wedra's confession to LaSpina conformed to the facts of the case as revealed by DeTore's confession and the other testimony at trial (998-1003). Wedra admitted to LaSpina that he was retained by Nicholas Gasperino for the purpose of a professional killing and that he shot Mrs. DeTore. He further admitted taking jewelry from the DeTore house so that he could later blackmail DeTore and also admitted that he failed in his attempt to make the job look like a burglary, and another crime.

The jury found both DeTore and Wedra guilty of murder and they were sentenced to terms of 25 years to life, and the conviction was affirmed by the Appellate Division and the Court of Appeals.

POINT I

The defendant's rights were not violated.

John DeTore arranged through Vito DiTomasso to meet Nicholas Gasperino who arranged to have Dorothy DeTore killed by Kenneth Wedra. The District Attorney preferring to secure a conviction of the actual killer, agreed not to prosecute DiTomasso and Gasperino if they testified before the grand jury and at trial. Both testified before the grand jury.

On November 17, 1969 at 10:15 a.m. the prosecutor made his opening statement (527, A1-9). Sometime between 11:00 a.m. and noon, counsel for Gasperino advised the Chief Assistant District Attorney and around noon, the trial assistant (1144, A11) that Gasperino had indicated to him that he was desirous of not testifying. Counsel further told the prosecutors that he would inform them at a later date of his client's final decision (1145, A12). On November 21, 1969, counsel informed the District Attorney that Gasperino would not testify if called (1146, A13). When called on November 25, Gasperino invoked his constitutional privilege out of the presence of the jury (1143, A10).[1] On November 24, when called to testify, Vito DiTomasso did in fact testify.

The only reference to Nicholas Gasperino's testimony made by the prosecutor in his opening statement reads as follows:

> "Likewise, you are going to hear from Nicholas Gasperino, the fellow who consulted with Kenneth Wedra, and relayed messages back and forth between DeTore and Wedra." (1534, A8)

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[1] Gasperino was later charged with murder and conspiracy to commit murder and entered a plea of guilty to the charge of conspiracy (aff'd 40 AD 2d 761, 336 NYS 2d 443, cert. den. 411 US 948, 36 LEd 2d 409, 93 SCt 1926).

The previous factual assertions in the prosecutor's opening statement with respect to the arrangements for the homicide did not attribute their source to a particular expected witness. Substantially all of the facts alleged by the prosecutor in his opening were proved at trial. It appears clear for obvious reasons that the prosecutor then believed that his principal witness with respect to these facts would be Nicholas Gasperino, but he did not say so. Those familiar with the case in its preparation, both prosecutor and defense counsel, may also have read the factual statements in the opening in this light, but the jury had no such insight. In fact, Gasperino's participation as a middle man as stated by the prosecutor was proved without his testimony, and therefore his assertion was not prejudicial. DeTore had confessed to Gasperino's participation as a middle man and Wedra had admitted to LaSpina that Gasperino was in fact the middle man. DiTomasso testified that he placed DeTore in contact with Gasperino who was to act as middle man in the homicide. Virtually all of the arrangements for the homicide down to the details of the money, were proved by the confessions and admissions of DeTore and Wedra. Indeed, DeTore admitted at his trial his contact with Gasperino, but claimed that the contract was to scare away his girl friend, and not to murder his wife.

No significant facts were brought to the attention of the jury in the opening which were not proved by witnesses or evidence actually introduced at the trial. It is not significant that the District Attorney mentioned Gasperino several times in his opening statement. He mentioned him, not as a witness, but as a participant, as the evidence did in fact show he was and in the light of this, the single reference to Gasperino being a witness (contained in the opening) was hardly prejudicial.

Gasperino was called by the People as a witness out of the presence of the jury and refused to testify. No motion for a mistrial was made.

The Court in its charge instructed the jury as follows:

> "Mention was made to you yesterday morning in the summation of Mr. Winters, the attorney for the defendant DeTore, that the witness, Nick Gasperino, had not testified and that said witness, out of the presence of the jury, had been sworn and, upon the advice of his attorney refused to answer any questions upon the ground that his answers might tend to incriminate or degrade him and relied upon his rights under the Fifth Amendment of the Constitution of the United States.
>
> "I charge you that no unfavorable inference should be drawn against the defendants by reason of Gasperino's invoking his right against self-incrimination, and I also charge you that no inference may be drawn by you in favor of or against the defendants, or either of them, or in favor of or against the People by reason of Gasperino's failure to testify.
>
> "You should not and must not speculate as to what Gasperino might have said had he testified, as such is not evidence in this case, and it would be highly improper for you to base your verdict upon speculation of this kind." (1567-1568, A20)

It is respectfully submitted that the instruction was perfectly proper. Where a party is unable to call a witness (as the people were here because of Gasperino's interposition of his Fifth Amendment rights), no adverse inference against him should be drawn. The instruction operated as well to the defendants' advantage. The separat issue of any prejudice arising from the opening cannot change this principle. In fact, the Judge's instructions here are one element of those circumstances which neutralized and nullified any potential prejudice in the opening.

> "It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be un-

avoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given."

Frazier v. *Cupp*, 394 US 731, 22 LEd 2d 684, 89 SCt 1420

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opening by Mr. Cowhey

November 17, 1969.

(The trial resumed at 10:15 a. m.)

(The defendants are present in court with their respective counsel, and the assistant district attorney in present.)

(The jurors are polled, and all are present.)

The Clerk of the Court: Your Honor, the People of the State of New York versus John DeTore and Kenneth Wedra. Are the People ready?

Mr. Cowhey: The People are ready.

Mr. Winters: The defendant DeTore is ready.

Mr. Ragno: The defendant Wedra is ready.

The Court: Let the record show that the defendants are in the court room.

(Mr. Cowhey made an opening statement to the Court and jury in behalf of the People, as follows:)

Mr. Cowhey: Good morning, ladies and gentlemen. May it please the Court, Mr. Foreman, madam and gentlemen of this jury:

As I mentioned at the early part of the selection of the jury, my name is James Cowhey, and I represent the district attorney's office, and I shall be presenting this case on behalf of the People of the State of New York.

What I am about to say to you is known as an opening statement. The law requires that such statement be made on behalf of the People. Very briefly, it gives me an opportunity to tell you what this case is about, what the People are going to prove, and how the People intend to prove this case.

I think it has been well mentioned up to this point that the charge against the defendant John DeTore is murder; and the charge against the defendant Kenneth Wedra is also murder.

Opening by Mr. Cowhey

Now, the facts surrounding that charge pertain to the death of one Dorothy DeTore, the wife of the defendant John DeTore.

Mrs. DeTore was killed on Monday, November 25, 1968, in her home at 47 Northfield Avenue, in the Village of Dobbs Ferry, New York.

After due investigation these two defendants were charged with the crime which is now being presented to you, which is known as the jury panel.

The People are going to prove this case to you through a series of witnesses, not limited to police witnesses who participated in the investigation of this case, but several other witnesses.

Part of the case is going to be presented to you on different motives or goals on the part of each of these two defendants. And while they are objectives, the purpose that each might have derived from this killing are entirely different between John DeTore and Kenneth Wedra. The general goal, the result, the objective, irrespective of the different benefits, could and would only be derived as a result of the death of Dorothy DeTore.

As in any despicable situation that occurs in life, there has to be some beginning to the story. You can go back over a long period of time and you can select many, many days as the possible beginning.

But let us start with the approximate period of October of 1968, say, about a month before the death of Mrs. DeTore. This is what we might call the irrevocable beginning, the beginning of the plot wherein she was destained to die by violence. The date when this plot was laid, and the date from which that plot was carried forward with no reversal whatsoever because of the death on the part of John DeTore or the defendant Kenneth Wedra, it was in the latter part of October, 1968, when John DeTore went down to the premises known as 890 Prospect Avenue in the Bronx. It has been referred to as a house of prostitution. There has been classical

literature that refer to it as a house of ill repute. In colloquial language it has been called a whore house.

Call it what you will, it has been known as a whore house, and John DeTore was a frequent visitor there, and was acquainted with that place, as well as the personnel in that business establishment. The lessee—let us use that word for lack of a better word—of that premises was one Diana Adair. While I may use the word tenant or lessee, you may hear other terms used to describe Mrs. Adair. Call her by any name you wish. She, too, knew John DeTore very well, and had for a long, long period of time, as you will hear from her testimony.

At these premises girls were not the only spice of life available. Other activities went on, including cards and the like. One of the parties who more or less took care of that aspect was Vito DiTomasso.

Mrs. Adair introduced John DeTore to Vito DiTomasso at 890 Prospect Avenue, in the Bronx. After a period of conversation, several conversations, between DeTore and DiTomasso at 890 Prospect Avenue, you will hear from the witness DiTomasso how inquiry was made by John DeTore for what might be referred to as a strong arm man, a muscle man, to take care of a problem that he, John DeTore had.

Vito DiTomasso spoke to one Nick Gasperino, and likewise Vito introduced Nick to John DeTore. Further conversations, interviews, et cetera, were had in reference to the so-called problem. I use that word in a large sense to cover the entire situation.

It is claimed by the People that Nick Gasperino thereafter went to the defendant Kenneth Wedra in reference to the same—the one, the same, and the only matter that was the objective of John DeTore, namely, the killing of Dorothy DeTore to rid himself of his wife, of any and all marital complications or associations.

Opening by Mr. Cowhey

After consultation with the defendant Kenneth Wedra, this Nicholas Gasperino was an in-between man, the message-carrier between John DeTore and Kenneth Wedra. The arrangements, the facilities, identification, details, et cetera were carried back and forth through this in-between man, from John DeTore to Kenneth Wedra; from Kenneth Wedra to John DeTore. But at all times there was only one goal, one objective sought by both parties; namely, the assassination of Dorothy DeTore fully, completely, and with finality.

This arrangement that was made was like a business arrangement, so to speak; and, like any business arrangement, business contract done in a professional way, there was a price involved.

Like any business arrangement or business contract, payments were arranged, so much in advance, and so much afterward.

It is going to be shown by the People by testimony we shall adduce that the total figure involved in this case was one of nine thousand dollars. That was the cost of a life, the life of Dorothy DeTore.

During the period of several weeks while she was walking about this earth that price was over her head. That's what her life was worth, if anyone on this earth is competent or qualified to put a money value on someone else's life. But that was the business arrangement here.

Like any professional businesslike type of contract there was to be a down payment, payable in advance, in this case five thousand dollars, to be paid by John DeTore through the in-between man. And the evidence and the testimony will show you how the down payment went to Kenneth Wedra. For what? For the purpose of the contract, the murder of Dorothy DeTore. Like any other professional contract, that was only the down payment, the part payment.

Future payments? Oh, yes, indeed. This was the professional way, as it was done. The down payment was only one part. After the result was accomplished, the murder of Dorothy DeTore, there was a balance of four thousand dollars due, the balance of payment for a human life. You will hear about the arrangements that were made and how this four thousand dollars was to be paid after she was annihilated.

What was done in reference to paying off this balance that was due to the killers, the actual trigger men, the actual killers? What was done on the part of John DeTore to carry out his part of his businesslike contract, to fulfill his final payment for a job successfully and permanently done, activities on the part of John DeTore subsequent to the death of Dorothy DeTore but in fulfillment of the contract to bring about her death?

You will also hear testimony from the witnesses who will be presented to you how Kenneth Wedra, subsequent to the death of Dorothy DeTore, was getting anxious for the balance of the payment due, made inquiries "How soon am I getting my money?"

And there was an advance made, not by, but on behalf of John DeTore; and the People, as part of their case, are going to show to you the chain of this money on this payment in advance, made on behalf of John DeTore on behalf of the final payment due to a contract to murder, the slay-for-pay contract; and that money will be traced into the hands of the defendant Kenneth Wedra, who is alleged by the People to be the individual who actually pulled the trigger (indicating) and assured the finality of the life of Dorothy DeTore, by being the actual trigger man in this case, right in her bedroom at the instant of death.

This was his part; this was his job according to this contract to kill. It was part of his responsibility under his profession or businesslike contract to kill.

Having done a job and successfully, there is nothing to argue with, he wanted his payment for a job completed. As I said, the chain of that balance, the advance payment on the balance, will be given to you as part of the testimony during the People's case.

The participation of each of these defendants will be elaborated by a variety of witnesses who will touch upon the series of items in evidence, including, if I may mention just a few of them, the matter of access to the house, of the DeTore residence, on November 25, 1968. The People are going to show to you that John DeTore did have a key made to his house, an extra key, and how that key traveled into the hands of John DeTore, to Kenneth Wedra, facilitated the carrying out of the contract to kill. That's just one of the items the People are going to show to you, the trace of that all the way through from one defendant to the other, from one party to the last party who are involved in this contract.

No one can dispute that nine thousand dollars is a lot of money. There are very few people who have that amount of money in their pocket. It has to come from somewhere. In this case the man making the payments was John DeTore. He is the one who wished the job done. Like anything else you want done, you want someone to do it for you, you have to pay for it. He paid nine thousand dollars.

We are going to show you where the down payment came from, namely, the five thousand dollars, where he got it from, when he got it, and the other details in reference to it, following the down payment right into the hands of the defendant Kenneth Wedra. Of course, that was only part of the payment. The balance of four thousand dollars, according to this business and professional arrangement, had to be paid, too.

The People are going to prove to you at a time when Dorothy DeTore lay in her casket that John DeTore was

gathering together the balance of payment to pay off for her death, which he had arranged and assisted in carrying out. You will discover the date and the place where that money was obtained through the variety of witnesses who will take the stand. I refer, not to one, but to several witnesses. Each of them have a part of the information which will establish a final and complete picture.

As I say, these are only two of the items of many, many items that are going to be preesnted as part of the People's case. Of course, with the amount of money involved, the nature of the people involved here, such businesslike arrangement, contract, of course, it appears quite obvious that this was in no sense an amateurish type of job, which it wasn't. It was not.

Part of the preparation to complete a job—one must prepare for the job; and, indeed, Kenneth Wedra in this case did prepare for his part, for the part he was to play on November 25, 1968. This was not a one-time deal, where he went up there on the date of death and performed his part. There were plans and arrangements that went into this before. Testimony is going to show and prove to each of you that he had full knowledge and intelligence as to not only what kind of a job he was getting into, but will show you the planning that went into this job on the part of Kenneth Wedra prior to November 25, 1968, to carry out his part.

That will include mentioning one item. About a week prior to November 25, 1968, Kenneth Wedra's car was parked on Northfield Avenue, in the Village of Dobbs Ferry—say about a week prior. Strategic location, strategic time, most strategic, to view the victim Dorothy DeTore on her way home from work, so there would be no question about identity, as to who was going to be murdered. This part of the planning, as I say, was about a week before.

Opening by Mr. Cowhey

The testimony that you will hear from all the witnesses will show what time she usually got off from work, the route she followed home, et cetera. It will verify what I mentioned to you as the strategic parking area, the strategic time, et cetera, all of which as in furtherance of the part played by Kenneth Wedra, and the final objective for his part of this contract, namely the actual killing, the actual murder of Dorothy DeTore.

Some of the witnesses that you are going to hear will include people who are going to make some kind of technical or scientific aspect of the investigation here, such as the medical examiner, the laboratory man, et cetera.

You are going to hear from the Dobbs Ferry Police Department. You are going to hear from one or more members of the New York State police who also participated in this investigation. You are going to hear from the people previously mentioned by Mr. Winters, Mrs. Diana Adair, Vito DiTomasso, who introduced John DeTore to Nick.

Likewise, you are going to hear from Nicholas Gasperino, the fellow who consulted with Kenneth Wedra, and relayed messages back and forth between DeTore and Wedra.

Without going into too much detail, it is quite obvious here, as in any business contact, Kenneth Wedra was interested in money. Dorothy DeTore, a human life, totally immaterial. Money was the consideration here. He was well paid for the time involved, for the act involved. No amount of money on the face of this earth could account for the nature of his participation in this cannibalistic act, the murder of Dorothy DeTore.

Now, John DeTore, yes, he, too, had his reasons. One of the witnesses who is going to shed light, as a personal reason, will be his fiance—his fiance as of November 25, 1968. She will testify about the wedding date, as to when John DeTore was scheduled to become a bride groom, on December 14, 1968, which is just one of the many views

that you are going to get of John DeTore's romantic leaning inclinations outside his home, and his reason for it will become abundantly clear during the course of the testimony here.

By the time all the evidence is in in this case, the People shall have proved to you beyond a reasonable doubt precisely what part each of these men took toward accomplishing the common objective, the common goal on the part of each of the defendants in the killing of Dorothy DeTore, without which either of them would have received the benefit sought. But this murder was the common objective pursuant to agreement and arrangement and plot and planning. Good planning, too, there can be no doubt about it; very good planning. It will be difficult to find anyone to say that this murder of Dorothy DeTore was carried out in any kind of an amateurish way. Certainly, I would not suggest that to either one of you, because I do not believe it.

When all the evidence and all the testimony is in in this case you people will see precisely what proof I am mentioning now I have to show that John DeTore played his part toward the common goal, the common goal I told you about, and that Kenneth Wedra, the other defendant in this case played his part toward the common goal, the common objective that each one of them had in mind, an objective which came through to fruition on November 25, 1968, and that each of these men, irrespective of the part played, is guilty as charged.

Thank you.

• • • • •

NICHOLAS JOHN GASPERINO, residing at 2729 Seymour Avenue, Bronx, New York, called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, testified as follows:

Mr. Lanna: Now, if your Honor please, I think the record should reveal that I represent the defendant. I

being Vincent W. Lanna, 50 Riverdale Avenue, Yonkers New York, and that I have already advised him that any questions which are asked of him by the prosecutor or for that matter any other attorneys, and I've advised both sides of this at this time, that I have advised this witness that he is not to answer those questions on the grounds that they may tend to incriminate him.

The Court: Mr. Gasperino, do you understand the advice which your attorney gave you?

The Witness: Yes, sir.

The Court: Is it your position that you decline to answer any questions upon his advice upon the grounds that they might incriminate you and you're standing under your rights under the Fifth Amendment of the United States Constitution; is that right?

The Witness: Yes.

Mr. Cowhey: Your Honor, may the record reflect the stipulation by and between Mr. Gasperino's attorney, Mr. Lanna, and myself, to the effect that no notice whatsoever of any kind or nature, in reference to Mr. Gasperino's present stand was given to me or to the district attorney's office prior to the opening statement in connection with this trial.

Mr. Winters: Pardon me. May I ask that that statement be read again. I didn't hear it.

The Court: Will you read this and read it loudly so Mr. Winters can hear it.

(The statement was read by the reporter.)

Mr. Lanna: I can't concur in that statement, only from this standpoint. I do not not know when the opening statement was made, but I can state for the record that I made this revelation to the district attorney's office during the morning hours of Monday, November 17, 1969.

I think the record should reveal whenever the opening statement was made. If the record may further

reveal that my revelation was made somewhere between eleven o'clock and noon that morning. Initially the revelation was made to Mr. Facelle, the Chief Assistant District Attorney and, as I was discussing it with him, Mr. Cowhey entered the room. I would say his entry was some time about noon, give or take a few minutes. I don't recall exactly what time.

Mr. Cowhey: Would counsel, Mr. Lichtenthal, and Mr. Winters and Mr. Ragno stipulate at the time that I made my opening statement in connection with this trial on Monday, November 17, 1969, that no notice had been given to me or the district attorney's office in reference to the present stand of Nicholas Gasperino?

Mr. Winters: I can't make any stipulation, if Mr. Cowhey intends to give that as his statement in lieu of an oath. That is, I don't want him sworn. If he wants to make that statement, I'd like to have the record reveal when the opening statement was made. I'd like to know that.

Mr. Ragno: I have no objection to having the stipulation between Mr. Cowhey and Mr. Lanna go into the record. I have no objection to it.

Mr. Cowhey: Would you be a part of that stipulation as to the facts contained in the stipulation?

(Discussion held off the record)

Mr. Ragno: If the record shows that the opening was made at 10:15, I would then stipulate with counsel as to when Mr. Cowhey and Mr. Lanna met.

Mr. Winters: The meeting between Mr. Lanna and Mr. Cowhey was at about twelve noon that day.

Mr. Cowhey: During the luncheon recess.

Mr. Winters: All right, I have no objection to that. Mr. Cowhey says so. That's his word.

The Court: Very well.

Is there anything further as far as this witness, that you wish to say, Mr. Lanna?

Colloquy.

Mr. Winters: Further I would say that it was at that time that Mr. Cowhey knew that this witness—or was told that this witness would not testify.

Mr. Cowhey: No, that is not true. That is positivly not true.

Mr. Winters: May we know then from Mr. Lanna or from Mr. Cowhey what was said in reference to this witness' testimony?

Mr. Lanna: Yes. In substance I conveyed to the district attorney's office the indication given to me by my client that he was desirous of not testifying as a witness.

I further informed Mr. Cowhey and Mr. Facile that I would discuss it further with my client and I would convey to their office at a later date during the course of the week, whether or not he had affirmed his position of not testifying, whether he had changed his mind.

On Friday, November 21st, I appeared here with my client and informed the district attorney's office that he had steadfastly or he was not going to testify, and that was his position then, and that is his position today, predicated upon the statement I made on the record after he was sworn and gave his name and address, that he refuses to answer any questions on the grounds that any answer might tend to incriminate him.

Mr. Ragno: I am satisfied with the stipulation as stated, your Honor.

Mr. Cowhey: Mr. Winters, what is your view?

Mr. Winters: I have no display here with that stipulation.

Mr. Cowhey: Mr. Lichtenthal?

Mr. Lichtenthal: Same as Mr. Winters.

Mr. Cowhey: At this time I would like to ask counsel and all defendants here to—

The Court: Just a second now, Mr. Cowhey. If anything further is involved with Mr. Gasperino or

Mr. Lanna, we will continue here in the open courtroom. If we have reached the stage in this case where Mr. Lanna and Mr. Gasperino are not involved, as far as any other legal questions, we will continue as to the rules which all counsel stipulated.

Mr. Cowhey: Your Honor, at this time I should like to advise the Court that we would like to proceed under the rules of *People* v. *Pollock*.

The Court: Very well. We will confer in chambers on that point. That does not involve Mr. Lanna or this witness.

Let the record show that the Court has made exception to our procedure, because Mr. Lanna was not a party to the stipulation. The Court therefore felt that anything in which he was interested had to be in the open courtroom for that reason.

Mr. Ragno: Are the witness and Mr. Lanna now excused?

The Court: Yes.

Mr. Cowhey: May this witness be remanded, your Honor.

The Court: Witness remanded.

Mr. Winters: Let me voice for the record my objection to the entire proceeding having been had in the absence of the jury.

The Court: Objection overruled.

Mr. Cowhey: Exception.

(The following occurred in chambers at 12:20 P. M.)

The Court: Let the record now show that we are back in chambers in the presence of the two defendants, the attorneys for all the defendants, the assistant district attorney, and the court clerk.

The Court assumes that counsel are all familiar with the case of *People* v. *Pollock*, 21 N. Y. 2d 206. If such is not the case, before going on, the Court has this case before it now and would be very happy

to read it or reread it, as the case may be, if they desire to do so.

Mr. Ragno: I have no such desire at this time.

The Court: Are you familiar with it, Mr. Ragno?

Mr. Ragno: Yes, I have read it, your Honor.

The Court: Mr. Winters?

Mr. Winters: Yes, I've read it.

The Court: And Mr. Cowhey?

Mr. Cowhey: Yes, your Honor.

The Court: Well, the Court will recall that in that case, the Court of Appeals suggested in a suggestion somewhat analogous to the case at Bar that the statement of the court silence of counsel is not to be taken as any assent that they agree that the situation is analogous. So we don't want the argument of the law.

Anyway, the suggestion was made by the majority opinion of the Court of Appeals that a stipulation could have been entered into, but failure to call, in this case it was Gasperino, was not to be regarded as implying that his testimony would have been adverse to the People's case, or that anything said to the jury, to the effect that omission to call Gasperino—again I'm substituting Gasperino for James, had any evidentiary significance.

Of course, the stipulation is not a compulsory thing, and so I ask if all counsel are willing to enter into such stipulation in this case.

Mr. Ragno: I would respectfully suggest that not only the words "diverse to the People" be included as suggested by the learned court, but that the defendant be added.

Mr. Cowhey: I don't think the full stipulation mentioned as recited was in the record.

The Court: Well, what would you like to add, Mr. Cowhey, that the Court did not read?

Mr. Cowhey: That omission to call Gasperino had

any evidentiary significance would free the prosecution—

The Court: That wasn't part of the stipulation suggested by the Court of Appeals, Mr. Cowhey. That was the consequence if a stipulation was not entered into, which is the reason I left it out in reading.

I will get to that point of the Court of Appeals decision, if it is neecssary to do so, but I don't think it would be part of your original stipulation, if you all should be willing to so stipulate.

Mr. Ragno: I would want the entire stipulation. I have heard your Honor's suggestion, and now it has been suggested by Mr. Cowhey that with that suggested stipulation that he would be free to explain to the jury the reason why the witness was not called.

I would object to such a stipulation, and would not consent to join one. I would consent to this stipulation, that no comment be made by either party as to why this witness was called or not called, that no mention be made of it, either by the defense or prosecution.

Mr. Winters: May the record show that Mr. Ragno talks for himself and not for me.

Mr. Ragno: That's right.

Mr. Winters: I should like my opportunity to talk after your Honor has finished what you propose—

The Court: Well, I am suggesting at the moment and I stress the fact that this is a suggestion and the fact that it comes from the Court does not place the slightest bit of compulsion, obligation or compulsion on the part of any of you to adhere to it.

I will be very glad to hear you, Mr. Winters.

Mr. Winters: I have read that case and reread it today, I am not ready to enter into such stipulation until I've had an opportunity to confer with my client

in view of one thing that I had heard just a moment before we walked out of the courtroom.

I'd like you to let that go. It's close now to the luncheon recess. It's 12:30.

Give me an opportunity to talk with him and talk with my co-counsel, before I either say yes or no to the proposed stipulation.

The Court: I think that that is certainly a fair request, and the request is going to be granted.

What I will do now, it's 12:30, we'll go out, we'll call the jury back and recess for lunch until two o'clock.

At that time, before we call the jury back in, we will come in here to see what procedure or arrangements, if any, shall be worked out.

(The following occurred in open court at 12:30 P. M.:)

The Court: Mr. Foreman, ladies and gentlemen of the jury: We just called you back in time to send you out to lunch. We will now recess until two o'clock.

Don't talk about the case, listen to any radio reports, read any newspaper accounts. Keep your minds open. Don't talk to anybody connected with the case.

Recess until 2:00 P. M.

(Whereupon at 12:35 P. M. a luncheon recess was taken.)

Afternoon Session

(At 2:25 P. M. the following occurred in chambers. Defendants and all counsel present.)

The Court: Gentlemen, before luncheon recess, we were discussing in chambers whether you gentle-

men could work out or not a stipulation concerning what should be done about the fact that the witness Nicholas Gasperino, who was called to the stand, outside of the presence of the jury, refused to testify, upon the ground of incriminating himself, and, in effect, took his rights under the Fifth Amendment.

Is there any stipulation or not?

Mr. Ragno: Under the Fifth Amendment?

The Court: Under the Fifth Amendment, excuse me.

Mr. Winters: On behalf of the defendant DeTore, I want the record to reflect that I am in no position to make a determination with respect to the stipulation that was proposed here at this time, and I ask an opportunity to determine whether I can or cannot. I put such stipulation upon the record.

Mr. Ragno: For the defendant Wedra, I would have had no objection to making the proper stipulation. I wish to point out that the disparity of reaction by learned co-counsel, Mr. Winters and myself, points up necessity for severance of trial, and I have moved for severance repeatedly and haven't gotten it. This is one of the difficulties of this trial. I would hope to move along with the trial and resume immediately after the colloquy.

The Court: Do you wish to say anything, Mr. Cowhey?

Mr. Cowhey: At this time the People would be willing to stipulate in accordance with the *People* v. *Pollock.*

The Court: In other words, as I understand it, the People and the defendant Wedra are willing to stipulate and the defendant DeTore, counsel desires more time before saying yes or no.

Mr. Winters: That's it. I want to assure your Honor at the same time that irrespective of what my

determination is Monday morning, I shall be able to proceed with the defense any time you call for it Monday morning.

The Court: The trouble with this position is, it just means we kill another half a day without further progress in the trial.

Mr. Winters: It won't take more than half, three-quarters of an hour. Everything that we're willing to postpone for until Monday, I'm willing to come in an hour earlier to make it feasible to do so.

The Court: All of you gentlemen, of course, each and every one of you, have a right to stipulate on behalf of your client or not to stipulate. In view of the fact that one of the defendants at this point has not stipulated, we have no stipulation.

I do call the attention of all of you to the language of the Court of Appeals in the *Pollack* case at the bottom of Page 211. By the *Pollack* case I mean *People against Pollack,* 21 N. Y. 2d 206.

At the bottom of 211, where the Court said, and I quote, ". . . or that anything said to the jury to the effect that omission to call James had any evidentiary significance would free the prosecution to tell the jury the reason on account of which he was not called."

I point out to counsel that if any mention is made by the defendants in their summation about the failure of the People to call the witness Gasperino, when in truth and fact the witness Gasperino has been called out of the presence of the jury, and taken the Fifth Amendment, the Court will feel constrained to permit the prosecution in its summation to rebut any inference, if one be raised by the defendants, by stating the true facts in the situation.

However, I now direct my remarks to the prosecution. I believe that unless an unfavorable inference was raised by the defendants or either of them, that

would be highly improper for the prosecution to refer to what had taken place in respect to the witness Gasperino, out of the presence of the jury.

Very well. We will now go out. And, as I am told, the People are about to rest.

We will have that done in the presence of the jury and then we will excuse the jury again and the defendants may make whatever motions they wish to make under the circumstances.

Mr. Winters: You won't adjourn the motions until Monday, either?

The Court: No, sir.

Charge of the Court

Mention was made to you yesterday morning in the summation of Mr. Winters, the attorney for the defendant DeTore, that the witness, Nick Gasperino, had not testified and that said witness, out of the presence of the jury, had been sworn and, upon the advice of his attorney, refused to answer any questions upon the ground that his answers might tend to incriminate or degrade him and relied upon his rights under the Fifth Amendment of the Constitution of the United States.

I charge you that no unfavorable inference should be drawn against the defendants by reason of Gasperino's invoking his right against self-incrimination, and I also charge you that no inference may be drawn by you in favor of or against the defendants, or either of them, or in favor of or against the People by reason of Gasperino's failure to testify.

You should not and must not speculate as to what Gasperino might have said had he testified, as such is not evidence in this case, and it would be highly improper for you to base your verdict upon speculation of this kind.